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In The

Supreme Court of the United States

October Term, 1993

YORK RITE BODIES OF FREEMASONRY OF SAVANNAH, *et al.*,

Petitioner,

vs.

BOARD OF EQUALIZATION OF CHATHAM COUNTY, *et al.*,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Georgia and the Court of Appeals of Georgia

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Does this case meet the qualifications for the grant of certiorari when there is no evidence that the recusal or disqualification of any appellate judge was based on the fact that the judge was or may have been a member of the Masonic organization?

II. Does the exercise of the power of recusal or disqualification by individual members of a state appellate court, either in accordance with state law or the judicial canons of ethics, raise any error of constitutional proportions?

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent in the above-styled action respectfully opposes the petition for writ of certiorari to the Supreme Court of Georgia and the Georgia Court of Appeals. Contrary to the arguments of Petitioner, there is no evidence in the record below that the disqualification or recusal of state appellate judges was based upon their membership in the Masonic organization. Moreover, the record fails to show any specific grounds upon which the recusals were based so that Petitioner's argument that they were in violation of statute is without merit. Accordingly, Respondent requests that the petition be denied.

STATEMENT OF THE CASE

This action arose out of the denial of an *ad valorem* property tax exemption for Masonically owned property in Savannah, Georgia. The trial court's initial ruling in favor of the Respondent was affirmed by the Georgia Court of Appeals in *York Rite Bodies of Freemasonry of Savannah v. Board of Equalization,* 198 Ga. App. 147, 401 S.E. 2d 30 (1990) (*York Rite I*). In that opinion, the court held that since the Petitioner's properties were used as meeting places and only by members of the organization, they were not exclusively dedicated to public charity. *Id.* at 149, 401 S.E. 2d at 32. As Petitioner has noted, six of the nine judges were listed as disqualified although the reasons for the disqualification was never explained by the court and no motion for disqualification was filed by any party.

The Supreme Court of Georgia reversed *York Rite I* in *York Rite Bodies of Freemasonry of Savannah v. Board of Equalization of Chatham County,* 261 Ga. 558, 408 S.E. 2d 699 (1991). Instead of ruling for the Petitioner, however, the case was remanded to the trial court for an evidentiary hearing. Again, as Petitioner has noted, two justices were disqualified and replaced by Superior Court judges.

After a hearing, the trial court entered its findings of fact and conclusions of law in favor of Petitioner, granting the tax exemption. That order was appealed by Respondent. In *Board of Equalization v. York Rite Bodies of Freemasonry of Savannah,* 209 Ga. App. 359, 433 S.E. 2d 299 (1993) (*York Rite II*), the Court of Appeals reversed the trial court, holding that there was ample evidence in the record to support a finding that the

> Masons devote a *substantial* amount of time and money to charitable pursuits which benefit the public. There [was], however, no evidence

> that the Masons are devoted *entirely* to such pursuits or that the lodges in question are devoted exclusively to those pursuits. On the contrary, evidence in the record shows that the Masonic organization devotes numerous resources to non-charitable pursuits which benefit only its members.

Id., 433 S.E. 2d at 300 (emphasis in original). There were no disqualifications or recusals on this panel. The subsequent petition for certiorari to the Supreme Court of Georgia was denied.

A. Response to Petitioner's Statement of the Case.

The jurisdictional statement and statement of the case in Petitioner's brief contains argumentative, conclusory and scandalous matter which should not be considered by this Court.

Both in the questions presented and jurisdictional statement, p. 2, Petitioner argues that there was a deliberate manipulation of court members to achieve a pre-determined result. This impugns the integrity of both state courts.

Petitioner argues that a personal vendetta or motive on the part of Respondent was allegedly recognized in the trial court's order when there is no such finding in that order or the record. Petitioner's Brief, pp. 8, 36.

Petitioner assumes or speculates as to the reason for disqualification or recusal of the various judges when there are no grounds given in any of the orders cited by Petitioner. Furthermore, Petitioner is improperly attempting to bolster or supplement the record in this case by the submission of affidavits from counsel and another witness, which information appears nowhere else in the case. Petitioner's Brief, pp. 11-16; Appendix, pp. 84-91.

SUMMARY OF ARGUMENT

Petitioner argues that the unusually large number of disqualifications on the Supreme Court of Georgia and Georgia Court of Appeals are evidence of a deliberate manipulation to insure a result favorable to Respondent, thereby violating Petitioner's due process rights. However, contrary to these assertions, there is no evidence that any of the disqualifications (which were unsolicited by any motion from Respondent) were the result of any Masonic affiliation of a judge, or precipitated by any anti-Masonic prejudice. In fact, the disqualifications, if they were done for reasons of Masonic affiliation, were completely proper under the Code of Judicial Conduct.

REASONS FOR DENYING THE WRIT

I.

THIS CASE DOES NOT MEET THE QUALIFICATIONS FOR THE GRANT OF CERTIORARI AS IT CONTAINS NO EVIDENCE THAT THE RECUSAL OR DISQUALIFICATION OF ANY APPELLATE JUDGE WAS BASED ON THE FACT THAT THE JUDGE WAS OR MAY HAVE BEEN A MEMBER OF THE MASONIC ORGANIZATION.

Petitioner questions the power and duty of a judge to disqualify or recuse himself on his own motion. When there is no motion for disqualification made by an interested party, the reasons for such self-disqualification, as in this case, may remain unknown. There is no evidence in the record why any of these appellate judges chose to remove themselves from the consideration of this case at various times.

In addition, in spite of the perceived systematic exclusion of judges presumably favorable to Petitioner, neither of the opinions

complained of (*York Rite I* and 261 Ga. 559) constituted a final ruling to Petitioner's detriment. *Injuria absque damno.* Other than the fact that it failed to prevail on the merits, Petitioner shows nothing evidencing support of its claim of constitutional violations.

II.

EXERCISE OF THE POWER OF RECUSAL OR DISQUALIFICATION BY INDIVIDUAL MEMBERS OF A STATE APPELLATE COURT, EITHER IN ACCORDANCE WITH STATE LAW OR THE JUDICIAL CANONS OF ETHICS, DOES NOT RAISE ANY ERROR OF CONSTITUTIONAL PROPORTIONS.

To accept Petitioner's argument requires the acceptance of a great many assumptions:

(1) that the disqualified judges were Masons;

(2) that the disqualifications were due to that relationship;

(3) that the disqualifications were orchestrated by some unknown entity because of anti-Masonic prejudice;

(4) that if number (3) is incorrect, then the orchestration occurred due to a fear of favoritism by the Masonic judges;

(5) that this constitutes disqualification because of bias or prejudice;

(6) that bias and prejudice are not statutory grounds for disqualification;

(7) that the disqualifications are therefore illegal.

Until the adoption of the Code of Judicial Conduct (231 Ga. A-1, eff. Jan. 1, 1974, rev. eff. Jan. 1, 1994), bias and prejudice were not considered grounds for disqualification. O.C.G.A. § 15-1-8; *Stevenson v. Stevenson,* 222 Ga. 47, 148 S.E. 2d 388 (1966). The Code mandates that a judge should disqualify himself if there is any appearance or suggestion of impropriety, or in any proceeding in which the judge's impartiality might reasonably be questioned. Canon 2, Canon 3.E(1)(a) (formerly 3.C.(1)(a)); *Savage v. Savage*, 234 Ga. 853, 218 S.E. 2d 568 (1975). The similarities of Canons 2 and 3 to 28 U.S.C. §§ 144 and 455 were noted in *Pope v. State,* 257 Ga. 32, 354 S.E. 2d 429 (1987). The court there cited with approval federal opinions interpreting these statutes as "self-enforcing." Assuming *arguendo,* that the disqualified jurists were Masons, recusal would be the ethical and proper action under the Code.

The case authority cited by Petitioner either pre-dates the adoption of the Code of Judicial Conduct or are procedurally distinguishable from the case at bar because they deal with motions to recuse made by a party. This procedural distinction is significant because of the "self-enforcement" nature of the Canons. "[W]here bias or prejudice of a judge has been shown concerning a party, it is error for the judge to hear and decide the case," *Savage, supra* at 856, 218 S.E. 2d at 571, although bias, without pecuniary interest, is still not a legal ground for disqualification. *Mitchell v. State*, 165 Ga. App. 258, 300 S.E. 2d 5 (1983). *Cf., Mann v. State*, 154 Ga. App. 677, 269 S.E. 2d 863 (1980) (bias toward party's attorney insufficient ground for disqualification).

In spite of the holding in *Savage, supra,* Georgia courts continue to utilize the statutory standard of O.C.G.A. § 15-1-8 when ruling on *motions* to disqualify. In affirming the denial of a motion to disqualify based upon the appearance of impropriety, the court of appeals found no legal error. However, "[t]his is not to say that Canon 2 or Canon 3(C)(1) was violated, but rather that we do not address their application because they are not the legal test."

Brannen v. Prince, 204 Ga. App. 866, 868, 421 S.E. 2d 76, 78 (1992). When the recusal is self-generated, reliance on the Canons is expected. However, when one party is attempting to require the removal of the presiding judge, the stricter statutory standards apply.

Therefore, in view of the fact that Respondent did not move for the disqualification of any judge, there was no irregularity or illegality in the disqualifications here.

Petitioner implicitly argues that it is entitled to have its case heard and decided by a court primarily composed of Masons. In light of Petitioner's unusual argument, Respondent can cite no direct authority because, as noted above, most appeals involving disqualification or recusal are usually the result of the denial of a motion made by a party. Nevertheless, in the interest of equity and fairness, it seems logical that parties are entitled to have their case heard by impartial, neutral judges (or at least those as neutral as humanly possible). This is the goal of Canon 3; Petitioner's argument ignores and subverts that very principle.

It should be obvious that this is nothing more than a collateral attack since Petitioner failed to win its case below on the merits. If the integrity and independence of the judiciary is to be maintained, this type of appeal cannot be allowed.

CONCLUSION

A petition for certiorari should be granted only when there are special and important reasons existing. U.S. Sup. Ct. Rule 10.1

There is no evidence in the record which supports Petitioner's argument that anti-Masonic prejudice disqualified any judge from considering this appeal below. Evidence is also lacking as to any Masonic connection between those judges who declined to hear

this case and the reason for that self-imposed disqualification. Finally, Petitioner has failed to show a violation of any constitutional rights by either of the state appellate courts.

Respondent respectfully urges the Court to deny the petition.

Respectfully submitted,

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